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No. 458

# In the Supreme Court of the United States

OCTOBER TERM, 1942

GEORGE SYLVESTER VIERECK, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (R. 329–352)[1] is reported at 130 F. (2d) 945.

### JURISDICTION

The judgment of the court of appeals was entered September 21, 1942 (R. 353). The petition for a writ of certiorari was filed October 15, 1942 and was granted November 16, 1942. The jurisdiction of this Court is conferred by Section 240

[1] References to portions of the record which were printed as an appendix to the petitioner's brief in the court below are designated by R.; and references to matters appearing in the typewritten transcript by Tr.

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the Act of June 8, 1938, as amended in 1939, which provided for the punishment of any political agent of a foreign principal registered with the Secretary of State who "willfully omits to state any material fact required to be stated" in his registration statement, was so indefinite as to be unconstitutional; whether the Secretary's requirement by regulation that registrants furnish a "comprehensive statement of nature of business of registrant" called for a disclosure of all political activities by the registrant, even though they were on his own behalf; and whether the Secretary was authorized to require such full disclosure.

2. Whether the indictment alleges an offense; and whether the alleged misconduct of the prosecutor constituted reversible error.

## STATUTES, RULES, AND REGULATIONS INVOLVED

The full text of the Act of June 8, 1938, c. 327 (52 Stat. 631), as amended by the Act of August 7, 1939, c. 521 (53 Stat. 1244), 22 U. S. C. 611–616, requiring the registration with the Secretary of State of agents of foreign principals, under which appellant was indicted, and the Rules and Regulations and forms issued pursuant thereto, are set forth in full in the Appendices A and B, separately printed, at pp. 1–18. Pertinent provisions of the Act of April 29, 1942 (Pub. 532, c. 263, 77th Cong.,

2d sess. (S. 2399)), amending the 1938 Act, are also set forth in Appendix A, at p. 5.

## STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia (R. 323) on Counts II, III and V of a five-count indictment (R. 1–19) [2] charging violations of the Act of June 8, 1938, c. 327 (52 Stat. 631), as amended by the Act of August 7, 1939, c. 521 (53 Stat. 1244), 22 U. S. C. 611–616, requiring agents of foreign principals to register with the Department of State. He was sentenced (R. 324–326) to imprisonment for eight months to two years and to pay a fine of $500 on each count, the terms of imprisonment to run consecutively, and to pay costs.[3] Upon appeal to the United States Court of Appeals for the District of Columbia, the conviction was unanimously affirmed (R. 353).

It was alleged in Count II of the indictment (R. 5–7) that in a supplemental registration statement filed on April 23, 1940, as agent of two German principals, petitioner knowingly and willfully

[2] A demurrer was sustained as to Counts I and IV (R. 53–56).

[3] Petitioner assigns as error the imposition of costs (Br. 36, 69–72). As the court below held (R. 351–352), however, the assessment of costs was authorized by the Act of May 8, 1792, c. 36 (1 Stat. 277), 28 U. S. C. 822. Petitioner's contention that this statute was superseded by the specific penalty provision of the Foreign Agents Registration Act, is answered in *Oates* v. *United States*, 233 Fed. 201, 207 (C. C. A. 4), certiorari denied, 242 U. S. 633.

failed to disclose, in response to item No. 11, which called for a "Comprehensive statement of nature of business of registrant," that during the period covered by the statement and in respect of matters pertaining to political interest, public relations, and public policy, he, in substance, advised, consulted and informed divers persons; placed and disseminated within the United States certain oral and written information and matter for publication, by writing, editing, preparing and revising speeches, public addresses and written matter which were thereafter printed and published in whole or in part in books, periodicals and newspapers and in the Congressional Record and which were also disseminated by means of radio broadcasts; aided and assisted one Prescott Dennett and others in organizing and financing the "Make Europe Pay War Debts Committee" for the purpose of disseminating oral and written matter designed to influence, persuade, bend, and mold American public opinion.

Count III (R. 7–11) alleged, in respect of the supplemental registration statement of October 25, 1940, the willful failure to disclose substantially the same material facts as those covered by Count II and in addition charged that petitioner, in substance: through the medium of the "Make Europe Pay War Debts Committee" disseminated and distributed by mail under congressional franking privilege and otherwise, speeches and public addresses delivered on the floor of Congress and

elsewhere by present and former members of Congress, to influence, persuade, bend and mold American public opinion; through the medium of a publishing house known as "Flanders Hall, Inc.," a New Jersey corporation, which was financed, controlled and directed by him, published, sold and distributed certain books and pamphlets, some of which were based on translations from publications issued by the German Information Service in Berlin.

Count V (R. 15–19) alleged that in respect of the supplemental registration statement of April 25, 1941, petitioner willfully failed to disclose material facts substantially the same as those covered by Counts II and III.

The Government's case may be summarized as follows:

*Petitioner's activities as a propagandist prior to last war.*—As bearing on petitioner's intentional failure to disclose the activities in question, certain evidence regarding his earlier methods in the field of political propaganda on behalf of Germany was introduced, as drawn from his own writing. Petitioner, a native of Germany, acquired American citizenship by virtue of the naturalization of his father in 1901 (R. 22). Beginning in 1907 he engaged in a literary career in this country and abroad (R. 168). However, "the World War diverted Mr. Viereck from poetry to politics" (R. 169), and by 1917 he had become one of Germany's foremost propagandists in this country (Gov't Ex.

12, p. 52). Writing of himself, petitioner stated: "He held, so to speak, the German-American portfolio in the propaganda cabinet. He shared with the late William Bayard Hale the portfolio of publicity. It was Viereck who advised the retention of Dr. Hale" (ibid.)

In 1930 petitioner published a book "Spreading Germs of Hate" which purports to be "an impartial study of war propaganda" (R. 169) and an exposé of petitioner's activities and methods during the last war (Gov't Ex. 12, p. xiii). Thus he made known that (*id.*, p. 55): "The objective of German propaganda was threefold: to strengthen and replenish Germany; to weaken and embarrass Germany's foes; and to keep America out of the War by spreading the truth as the Germans saw it." To accomplish this objective petitioner engaged in a camouflaged campaign of "manipulating public opinion" (*id.*, p. 11) which successfully "kept American sentiment divided, even after the Lusitania, and played an important part in the presidential campaign in 1916" (*id.*, p. 104) and kept "America out of the war from August, 1914 to April, 1917" (*id.*, p. 118).

In describing the technique of a propagandist, petitioner explained:

> * * * While the law requires that the ownership of a newspaper must be fully disclosed, there was nothing to prevent the German Government or an individual German from making a present of several

> million dollars to an American sympathizer; nor was there anything to prevent the sympathizer from making this money talk—for Germany! There is no safeguard which the law can create which human ingenuity cannot circumvent (*id.*, p. 90).

He also stated:

> It is difficult to draw a line between legitimate political agitation and propaganda. It is not always possible to determine where the one ends and the other begins. It is at times hard to distinguish between the press agent, the lawyer, the public relations counsel, the reporter, the educator, the preacher, the politician, the statesman, and the propagandist (*id.*, p. 10).

Petitioner further explained that "Each side attempted to hide its own selfish end behind some legitimate American purpose. It has been said that patriotism is the last resort of the scoundrel. It was the first resort of the propagandist. Every propagandist draped himself in the flag" (*id.*, p. 106).

In brief, petitioner showed that prior to America's entry into the last war, German propaganda, which he in good measure directed, sought to mold public opinion in this country (1) by utilizing the "propaganda wolf in sheep's clothing" who posing as "friends and constituents" gave to Congressmen "suggestions for resolutions" (*id.*, pp. 104–105); (2) by the organization of committees which "underwent many metamorphoses and c h a n g e s of

name" but which "were financed from the same secret source" (*id.*, p. 99); and (3) "Articles likely to prove effective weapons were reprinted as pamphlets. The smallest edition was twenty-five thousand. Some attained an addition of several hundred thousand" (*id.*, p. 82).

*Registration statements filed by petitioner.*—On September 26, 1939, a few weeks after the present war in Europe started, petitioner filed with the State Department a registration statement required by the Foreign Agents Registration Act, as United States correspondent for the *Münchner Neueste Nachrichten*, a newspaper of Munich, Germany, under a one-year contract dated July 20, 1939, providing for compensation at the rate of $500 per month beginning August 1939 (R. 20–25). Later there was also attached to this registration statement a copy of a contract dated September 27, 1939, between the petitioner and the German Library of Information, a branch of the German Government (Tr. 110, 115, 132, 137, 144, 161, 166, 170; and see Tr. 184, 222), by the terms of which petitioner agreed for $500 per month to do editorial work in connection with "Facts in Review," a publication of the Library which eventually attained a circulation of 100,000 copies per week (R. 25–26, 48). On March 17, 1941, petitioner filed another initial registration statement to cover a contract between him and Dr. Giselher Wirsing, of the Munich newspaper, under which petitioner agreed to act as agent for publication in the United States of a book, "The One Hundred Families Who Rule

Great Britain," written by Wirsing and published by Verlag, Knorr and Hirth, a publishing house in Munich. Petitioner had received $10,000 to be used by him at his discretion to cover publication costs, advertising, publicity, distribution, etc. (R. 37–41.)

At six months' intervals after the first registration statement was filed, petitioner filed three supplemental registration statements, as required by the Act, and which are the subject matter of the three counts in the indictment upon which he was convicted. In the first one, filed on April 23, 1940 (R. 26–29), petitioner stated that during the six months' period he had received $3,500 from the newspapers and $3,650 [corrected to $3,150; see R. 34–35] from the German Library of Information, plus extras in the amount of $1,200. In the second supplemental registration statement, filed on October 25, 1940 (R. 30–34), he admitted that he had received $3,000 from the Munich newspaper, $3,000 from the German Library of Information, and $7,650 for extras for editorial editing, supervising and writing prefaces.

In the third supplemental statement, filed April 25, 1941 (R. 44–47), petitioner reported that there was no change in his status except that he had executed a new contract with the German Library of Information under which he was to receive $2,500 per month; and that during the six months covered by the statement he had received $8,300 from the Munich newspaper (which included payments in

advance to February 1942), $25,504.09 from the German Library of Information, and $10,000 as previously reported on March 17, 1941, from Wirsing in connection with the publication of "The One Hundred Families."

Thus, during the eighteen-month period covered by the three supplemental registration statements appellant received more than $65,000 from his German principals.

In answer to question 11 on each of the supplemental statements, which called for a "comprehensive statement of nature of business of registrant," he reported "same," as previously reported—that is, "author and journalist." (R. 21, 28, 31, 45.)[4] In none of these statements did he disclose any of his activities in the political affairs of this country. As alleged in the indictment, these activities, which followed closely the pattern of petitioner's activities prior to the last war (see pp. 5–8, *supra*), were threefold:

1. *Petitioner's control of Flanders Hall, Inc.*—In 1939 one Sigfried Hauck, who had written a book, "The Scarlet Finger," formed a corporation, Flanders Hall, Inc., which had published "just the one" book (Tr. 233–234). A copy of the book was sent to petitioner, who wrote the author a "flattering letter praising the book,"

[4] "Same" in the last-cited statement may be taken to refer to "Author, Editor and Publicist" in the statement of March 17, 1941 (R. 38), the subject of the dismissed Count IV.

although it was not well received generally (Tr. 234, 235). Thereafter, in March 1940, Hauck went to work for petitioner "sharpening his pencils, and hanging up the shades when he tore them down" (Tr. 237), putting into better English a book which apparently had been translated from a German book (Tr. 238–239), obtaining bids for printing publications of the German Library of Information, reading the Congressional Record each day and picking out pertinent debates, speeches, etc. (Tr. 236–240, 429–430). A great deal of the material Hauck worked on appeared ultimately in "Facts in Review" (Tr. 430–431).

Finally, petitioner decided to take over Flanders Hall "without change of officers or stock or anything" (Tr. 251–252) and, by a letter dated August 3, 1940, confirmed an oral agreement he had made with Hauck which provided that Flanders Hall would publish books and pamphlets from manuscripts furnished by petitioner; that petitioner would advance the necessary money for this purpose; that Flanders Hall would repay petitioner out of money received from the sale of the books before any other charge was paid; that all moneys advanced by petitioner would be returned to him before Flanders Hall could make any profit on the sale of the books; that Flanders Hall would make no disbursements without petitioner's written consent and would furnish him weekly with a statement of expenses; that petitioner's representatives would have access to the books at any time; that

Flanders Hall would not incur any liabilities on behalf of the company without petitioner's knowledge and consent; and that petitioner would have an option to purchase two-thirds of Flanders Hall's outstanding capital stock for not more than $500 (Tr. 257–259).

After this contract was agreed upon, Flanders Hall published nine books,[5] the manuscripts of which were furnished by petitioner (Tr. 261–262, 290–292, 341), and eight others[6] (Tr. 342–343, 366–367), all of them being highly critical of British foreign and colonial policy. Some of the books which purported to be English translations of French or Dutch works, or as having been compiled from English sources, were in fact translations of German books published by the *Deutche Informationsstelle*, or German Information Service, of Berlin.[7] As to others, petitioner instructed Hauck

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[5] Inhumanity Unlimited (Gov't Ex. 7), Democracy on the Nile (Gov't Ex. 8), It Happened Again (Gov't Ex. 9), The Hapless Boers (Gov't Ex. 13), The Slave Business (Gov't Ex. 14), Misadventure in Scandinavia (Gov't Ex. 15), The Double Cross in Palestine (Gov't Ex. 16), Seven Periods of Irish History (Gov't Ex. 17), War Against Women and Children (Gov't Ex. 18).

[6] Cease Firing (Gov't Ex. 28), Turkey Reborn (Gov't Ex. 29), The 100 Families That Rule the Empire (Gov't Ex. 32), What About Africa (Gov't Ex. 34), Children of the Slums (Gov't Ex. 31), The Whipping Block (Gov't Ex. 30), We Must Save the Republic (Gov't Ex. 35), The Way of the Aggressor (Gov't Ex. 33).

[7] "Inhumanity Unlimited," which purported to be from the French of Jeanne d'Arc Dillon La Touche, was in fact a

to change the names of the purported authors after he had given Hauck the manuscript.[8] After Hauck had received a complaint from an indignant customer, petitioner admitted that certain of the books were "adaptations" of other books previously published in other languages (Tr. 268).

At a conference between Hauck, Prescott Dennett, and petitioner in the latter's New York apartment during the winter of 1940–1941, Dennett indicated that he thought he could do some publicity work through a number of prominent Americans, including Congressmen with whom he was familiar, to promote sales of Flanders Hall books (Tr. 346–351). Following the conference Dennett furnished them a prospectus of a publicity campaign in which Dennett suggested the obtaining

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translation of a German book, "England's Herrschaft in Indien" by Reinhard Frank, published by the *Deutsche Informationsstelle* (Tr. 480–482). "Democracy on the Nile," which purported to be compiled from British sources by Sayid Halassie, Doctor of Divinity, an Ethiopian name, was in fact a translation from a German book, "England's Gewaltpolotik am Nil," by Paul Schmitz, Kairo (Tr. 482–484). "The Hapless Boers," which purported to be translated from the Dutch of Eugene Vroom, was translated from the German book "England und de Vuren" by Stephen Schroeder, published by the *Deutsche Informationsstelle* (Tr. 467–476, 478–479).

[8] According to the manuscript, the author of "Misadventure in Scandinavia" was Carl Hordsen, but petitioner told Hauck to change it to Arno Deutelmoser (Tr. 304–305). Similarly, the author's name for "War Against Women and Children" was changed at petitioner's direction from H. J. Bartone to Werner Schaeffer (Tr. 306–307).

of manuscripts from Congressmen for publication, and petitioner approved of this suggestion (Tr. 353–356). In connection with or as a result of Dennett's publicity work, "The 100 Families That Rule the Empire" was mentioned in a radio speech by Congressman Sweeney of Ohio (Tr. 362, 365–366). Flanders Hall also published "We Must Save the Republic," by Congressman Stephen A. Day of Illinois, after petitioner had improved the manuscript (Tr. 366–368). Hauck received a $1,000 check from the "Make Europe Pay War Debts Committee," (see pp. 15–18, *infra*) signed by Dennett, to be used to promote the sale of Congressman Day's work (Tr. 387).

Hauck also discussed with petitioner and Senator Rush Holt publication by Flanders Hall of two of Holt's manuscripts, one of which was "Who's Who Among the War Mongers" (Tr. 381, 382). Hauck saw the manuscript for "Who's Who Among the War Mongers" at petitioner's apartment in New York, and it then consisted of clippings from the Congressional Record, with penciled words connecting them (Tr. 373–374, 1042, 1043). Later he saw the manuscript in typewritten form at Holt's home in Washington (Tr. 383). The original Holt manuscript in clipping form was thereafter intercepted by the British at Bermuda and identified by the censor as having been found inside an envelope addressed to Dr. Hans Dieckhoff, Berlin, Germany, former German Ambassador to the United States, which envelope was in

turn contained within an outer envelope addressed to Senhor Hoyningero Hueneros, in Lisbon, Portugal, which was an alias used by the German Embassy in Lisbon (Tr. 1048–1061). The addresses on these envelopes had been typed on the same typewriter as were three letters from petitioner to Hauck (Tr. 1036–1037, 1085).

From August until December 1940, Flanders Hall received $11,750 from petitioner, and during 1941, $10,750, or a total of $22,500, none of which was repaid, except that petitioner, acting as agent for the company and the German Library of Information, retained $4,500 from the proceeds of two sales of books which he made to the Library. "The company itself never did make any profit" but "was a losing venture right from the very start." (R. 253–257.)

2. *Petitioner's connection with the "Make Europe Pay War Debts Committee."*—Petitioner conceived the idea of organizing a committee which was first known as the "Make Europe Pay War Debts Committee" and, subsequently, as "Islands for War Debts Committee" (Tr. 546–547, 605). In addition to petitioner, the organizers of the committee were the late Senator Lundeen of Minnesota, as chairman, Prescott Dennett, and Linn Gale (Tr. 546–547, 591–592; 598). Offices of the committee were established by Dennett, who also was the head of the "Columbia Press Service," in the Bond Building of Washington, D. C. (Tr. 548, 580). The committee carried on a vigorous program of dis-

seminating by mail, under Congressional frank, reprints of speeches by various isolationist members of Congress and other matter inserted in the Congressional Record under their extension of remarks (Tr. 581). Seven or eight people were employed "addressing franked speeches" and sending them out to thousands of names contained on mailing lists made up from Congressmen's "fan mail" (Tr. 551–554), "Who's Who in Law and Medicine," "Who's Who in the Clergy," "Who's Who in Business and Industry," "German-American Board of Trade" (Tr. 542–543, 586–588). There was testimony that "mail sacks of franked speeches were coming into the office practically every day," and "at one time there were approximately thirty sacks of mail of franked speeches" in the office (Tr. 552–553).

Late in 1940 or early in 1941 Dennett came to see George Hill, a clerk in Congressman Fish's office, and identified himself as being connected with "Make Europe Pay War Debts Committee" (Tr. 535–536). He gave Hill some material and suggested that Hill have it inserted in the Congressional Record. Hill had the article "England Expects Every American To Do His Duty" inserted in the Record under the remarks of Senator D. Worth Clark (Tr. 612–613), and ordered from the Government Printing Office 85,000 copies of reprints at a cost of $373.50, which was paid by Dennett (Tr. 615–616). Thereafter Dennett brought an article, "Giddy Minds and Foreign

Quarrels," to Hill and said he could not get anyone else to put it in the Record. Hill had it inserted under the remarks of Senator Clark (Tr. 618) and ordered 10,000 reprints at a cost of $73.45, which was paid by Dennett (Tr. 619–621). Hill had inserted in the Record "Mrs. Lundeen Answers Walter Winchell" and ordered 25,000 reprints thereof at a cost of $55.22, which was supplied by Dennett (Tr. 625–626). He also obtained for Dennett 25,000 reprints of "Aid to England" at a cost of $47.55 (Tr. 624–625); 25,000 reprints of "No Further Without War" at $47.55 (Tr. 626); 60,000 reprints of an article in three parts entitled "You Are on Your Way to War," "Stop the March to War" and "Three Steps to War" at $196.20 (Tr. 626–628); 50,000 copies of "Mrs. Roosevelt is Mistaken" at $86.15 (Tr. 629); 28,000 copies of "Three Warnings" and 30,000 copies of "We Burned Our Fingers Once" (Tr. 630–631). Hill received from Dennett something like $3,000 over a period of seven to eight months to purchase reprints of what was inserted in the Record (Tr. 623–624).

Throughout this period, petitioner worked closely with Chairman Lundeen of the Committee, holding conferences with him in the Senate Office Building as often as "two or three times a week" (Tr. 933, 715–716, 762). He also conferred with Dennett "in the inner office" of the Committee's headquarters, "discussing, or going over letters

and material and correspondence," and when petitioner was in New York Dennett communicated with him by long-distance telephone (Tr. 548–549). Committee stationery, envelopes and cards were sent to him in New York; and mailing lists were prepared for him (Tr. 542–543, 546, 586–588), many of which he also furnished to Flanders Hall (Tr. 405–412, 417–418).

3. *Petitioner's activities on Capitol Hill.*—Throughout the period of the indictment, petitioner frequented the Senate and House Office Buildings, especially the offices of the late Senator Lundeen of Minnesota and Congressman Hamilton Fish of New York, his friend of ten or fifteen years' standing (Tr. 933, 520, 648, 650, 670). He was also friendly with the stenographers and clerks in these offices and there was testimony that "he was throwing $5 bills for them to buy candy" (Tr. 751).*

The record shows that petitioner wrote at least three speeches, two of them in collaboration with the German Embassy, which were delivered by Senator Lundeen, inserted in the Congressional Record, reprinted and distributed under the congressional franking privilege. Thus, on March 23,

* When an employee of the "Make Europe Pay War Debts Committee" told petitioner that she had seen him at the Committee's office, he told her "I should have bought you some candy, and then you would not have seen me over there" (Tr. 556).

1940, petitioner called the German Embassy by telephone from Senator Lundeen's office and told them he had to have "the material for Senator Lundeen's office." After some conversation petitioner stated, "Monday will be all right." (Tr. 723.) On Monday, March 25, 1940, a messenger from the German Embassy arrived at the Senator's office with an envelope, asked for petitioner, and when he learned the petitioner was not there at that time, left the envelope and asked that it be delivered either to petitioner or Senator Lundeen (Tr. 723-724). The envelope contained a typewritten speech concerning the activities of the late Lord Lothian, British Ambassador to the United States, and was entitled "Lord Lothian against Lord Lothian" (Tr. 725). The speech was subsequently published by Flanders Hall in pamphlet form and advertised as containing "The most powerful arguments * * * against spilling the blood of our sons on European battlefields" (Tr. 324).

On another occasion during March 1940, in Senator Lundeen's office, petitioner dictated the outline for a speech entitled "German-American Trade Relations" (Tr. 936-937). After petitioner and Senator Lundeen went over this outline, petitioner had the German Embassy send to the Senator's office the necessary material to fill in the outline (Tr. 938-939). Senator Lundeen did not use the material collected by one of his clerks, say-

ing that petitioner had better material (Tr. 778–779).[10]

The speech "German-American Trade Relations" was inserted in the Congressional Record on June 12, 1940 (Tr. 728–730), and the speech "Lord Lothian against Lord Lothian" was inserted in the Congressional Record on June 19, 1940 (Tr. 241, 726), both under the remarks of Senator Lundeen. Petitioner went over the Lord Lothian article in the Congressional Record with the Senator in the latter's office and the Senator remarked, "Well, there can be no objection to that, because it is actual quotations from Lord Lothian." Later when they were leaving the office, the Senator said to petitioner, "There is one thing, one mistake we made in that speech, and that is that we left out headings." (Tr. 765–767, 941.)

In July 1940, Senator Lundeen called George Hill in the office of Representative Fish by telephone and mentioned that he was going to make a speech concerning the activities of six important men involving the United States in war, and talked about having copies of it mailed out. Petitioner was there and also talked to Hill about mailing out copies of the speech. (Tr. 768–772.) At 6:30 that evening, in Senator Lundeen's office, the Senator

[10] Senator Lundeen's files also contained "a great many other envelopes from Hans Thomssen of the German Embassy" (Tr. 734), and after the Senator's death on August 31, 1940 (Tr. 744, 853, 911, 1112), Mrs. Lundeen took all of the Viereck matters out of her husband's files (Tr. 791).

and petitioner were working on a draft of this speech—"Six Men and War"—and petitioner stated, "I have tried to phrase it in the best way I could in a manner in which you speak." At 10:30 that night they were still working on it together in the Senator's office. (Tr. 773–775.)

At or about this time Representative Fish introduced petitioner to the Congressman's clerk, George Hill, and told Hill that petitioner wanted to mail out some speeches of Senator Lundeen and also told him to send them out to the mailing list of The National Committee to Keep America Out of Foreign Wars, of which Fish was the chairman (Tr. 519–520, 648, 649–650). Petitioner informed Hill that he wanted to send out 125,000 copies of Senator Lundeen's speech "Six Men and War" and told Hill to contact the Senator for all of the details including payment. When petitioner learned that the Committee's mailing list had 100,000 names he asked Hill for a copy and gave Hill two $50 bills as a "tip" for it. (Tr. 521–523.) Petitioner then asked Hill if he had any other lists. Hill replied that he did not but agreed at petitioner's request to make up a list of "Who's Who in America." Upon delivery of this list, petitioner gave Hill another "tip" of two $50 bills for it. (Tr. 521–523, 530.) Subsequently, 123,000 copies of the speech "Six Men and War" were mailed out by Hill for petitioner under Senator Lundeen's frank, and the Senator paid Hill for them (Tr. 523–527, 607–608).

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SUMMARY OF ARGUMENT

1. The Act, with sufficient definiteness, apprised registrants that they must report all details of their activities in respect of the dissemination of political propaganda. The Act provides for the punishment of any person who "willfully omits to state any material fact" in his registration statements. In the light of the manifest purpose of the Act, the activities in question were plainly material facts required to be stated. The standard of materiality is not uncommon in criminal statutes. Furthermore, the statute was implemented by regulations, rules and registration forms. The regulations required registration on the part of one engaged in political propaganda activities "whether or not" those activities were "on behalf of" his foreign principal. The registration form required a "comprehensive statement of nature of registrant's business." Neither expressly nor by implication was the requirement limited to political propaganda activities on behalf of the foreign principal.

Furthermore, petitioner is in no position to complain of indefiniteness of the statute or regulations. Petitioner has been convicted of a willful omission to disclose material facts. The evidence supports the conclusion that, in the language of the court's charge, he willfully intended to conceal from the Secretary of State and the American people the political propaganda activities in question, and to that end willfully omitted to include these activities

in his response to question 11 of the registration form. The Act and regulations were, on any view, sufficiently definite to put petitioner on warning. When one knows that he has come close to the line "it is familiar to the criminal law to make him take the risk" (*United States* v. *Wurzbach*, 280 U. S. 396, 399). Petitioner failed to seek resolution of whatever doubts he may have had by making inquiry of those charged with administering the statute. The statute does not impose a prohibition on liberty of conduct but requires only disclosure of facts, and petitioner chose the hazard of criminality rather than the certain protection of full disclosure. There is here involved no question of indefiniteness which leaves to the jury a law-making function after the event. Cf. *Herndon* v. *Lowry*, 301 U. S. 242, 261–264.

The Secretary was authorized to require disclosure of all the registrant's political propaganda activities. Otherwise it could not be known in which of his dual capacities a registrant was acting. There can be no doubt that Congress intended, when it passed the Act, to prevent the spreading of political propaganda by foreign agents unless the public was fully informed as to the possibility that it was subsidized from abroad.

2. The indictment was sufficient. Notwithstanding the absence of proof that the activities charged were "hostile to the United States" or "disloyal to our country," or anything "more than an ill-advised business venture," or that petitioner "was

acting as the agent of any foreign principal," these activities were required to be reported; and the allegations in the indictment that petitioner willfully failed to disclose them clearly charged a violation of the statute. (Pet. Br. p. 57.)

The prosecutor was not guilty of reversible misconduct. Neither individually nor collectively, do the acts complained of constitute prejudicial error, particularly since this is no "weak" case, petitioner not questioning the sufficiency of the evidence. The mail bag incident was, at the most, but unnecessary stage business. The complaints that the prosecutor attempted "to create sinister aspects" and to "smear" certain members of Congress are, in reality, but protests against the admission of damaging evidence. The reference in the prosecutor's argument to the jury to passages from the book "Spreading Germs of Hate" were proper since the book had been admitted in evidence, and even the petitioner made liberal use of the book. Apart from the fact that timely objection was not made to the prosecutor's statements in summation, they must be read in the light of defense counsel's summation, to which they were addressed in rebuttal. Finally, the court did instruct the jury that our relations with Germany were not to be considered on the question of guilt or innocence, and that petitioner's registration did not warrant an assumption that he was engaged in unpatriotic conduct.

## ARGUMENT

### I

### THE ACT OF JUNE 8, 1938, AS AMENDED, AND THE REGULATIONS REQUIRED WITH SUFFICIENT DEFINITENESS THE DISCLOSURE OF PETITIONER'S ACTIVITIES AS A PROPAGANDIST

1. *The Requirements of the Act were Sufficiently Definite.*

Petitioner, who by registering admitted that he was a propaganda agent of a foreign principal,[11] contends that if his activities constituted "material" facts required to be disclosed on his supplemental registration forms, the Act of June 8, 1938, as amended, was unconstitutional for failure to fix any standard of conduct (Br. 38, 40–42, 45–48).[12]

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[11] Persons "performing only private, *nonpolitical*, financial, mercantile, or other activities in furtherance of the *bona fide* trade or commerce" of their foreign principals were exempted from registering by section 1 (d) of the Act. (Italics supplied.) Similarly, Part I, Chapter II (18), App. B, pp. 9–10, of the Regulations adopted by the Secretary, provides "The term *nonpolitical activities in furtherance of bona fide trade or commerce* means such activities as are religious, educational, professional, scientific, or related to the fine arts, which do not in any essential respect relate to the establishment or conduct of a government or relations between one government and another."

[12] The statute under which the indictment was drawn was further amended by the Act of April 29, 1942 (Pub. 532, c. 263, 77th Cong., 2d Sess. [S. 2399]). See App. A, p. 5, *infra*. The court below (R. 343–345) adequately disposed of petitioner's argument (Br. 37, 44, 48, 55, 69) that this amendment, which expressly defines the material facts to be disclosed, supplies a *casus omissus* in the earlier Act.

More specifically, he argues that the Act, which provided for the punishment of any person who "willfully omits to state any material fact" in his supplemental registration statement was indefinite and uncertain in that the Act failed to define what "is a material fact required to be stated" (Br. 38).

Petitioner's contention is without merit. It is submitted that the Act, with sufficient definiteness, apprised registrants that they must report their activities in respect of the dissemination of political propaganda.

Section 5 of the Act provided that:

> Any person who * * * in complying with the provisions of this Act * * * willfully omits to state any material fact required to be stated therein shall * * * be punished * * *.

As the court below pointed out, "such a phrasal criterion [any material fact required to be stated] has long been an accepted part of our system of laws" (R. 344). And we submit that what was "material" in this case was plain from the various provisions of the Act. Thus, its purpose, as stated in the title of the Act (App. A, p. 1), was "to require the registration of certain persons employed by agencies *to disseminate propaganda in the United States* and for other purposes." [Italics added.] Only *political* propagandists were required to register, those performing nonpolitical activities being expressly exempted and registration being required only of "any per-

son who acts or engages or agrees to act as a *public-relations counsel, publicity agent, or as agent, servant, representative, or attorney* for a foreign principal" (Sec. 1 (d), App. A, p. 1). [Italics added.] By Section 3 (c) of the Act (App. A, p. 4), the Secretary of State was directed to require "such details required under this Act as * * * [he] shall fix, of the activities" of the registrant "as agent of a foreign principal" during the semi-annual period; and Section 6 (*ibid.*) "authorized and directed" him "to prescribe such rules, regulations, and forms as may be necessary to carry out this Act." It seems plain, therefore, that from the face of the statute any registered propagandist would know that the Secretary was required to obtain information as to the registrant's activities of a political nature in connection with the dissemination of propaganda in the United States, and that the failure to disclose such activities when called for, would constitute an omission of a "material fact."

In *Coplin* v. *United States*, 88 F. (2d) 652 (C. C. A. 9), certiorari denied, 301 U. S. 703, the constitutionality of certain sections of the Securities Act of 1933 was challenged. Among other things, it was argued that Section 17 (a) (2) violated the Fifth and Sixth Amendments to the Constitution in that such section "does not meet fair and honest standards for the legal definition of crime, because it is vague, indefinite, and fails to state an immutable standard of guilt." This section made it ille-

gal to sell securities in interstate commerce "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." In upholding the constitutionality of this section, the court stated (at p. 657.):

> No honest and reasonable citizen could have difficulty in understanding the meaning of "untrue," "material fact," "any omission to state a material fact," "in the light of the circumstances under which they were made," or "misleading." All these terms, it is true, call for interpretation in accordance to the facts of a given case. So do the terms "malice," "probable cause," "self-defense," "negligence," "fraud," "duress," "justification," and thousands of other expressions well established in the law.
>
> Isolated from their setting, any of the foregoing terms might be said to be "indefinite" or "uncertain"; but, "in the light of the circumstances under which" they are used, their meaning is clear enough to the reasonable and well-intentioned citizen. "That is certain which may be rendered certain."

See also *Gorin* v. *United States*, 312 U. S. 19, 26–28, upholding the prohibition contained in the Espionage Act against obtaining information "connected with" "the national defense," and in which the cases are collected (p. 27); and also *United States* v. *Ragen*, 314 U. S. 513, 524.

In the present case the Act does not stand alone. It was administered in accordance with Regulations which gave the familiar statutory language more concrete content. In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and similar cases relied upon by petitioner, the statute which was held to be too vague and indefinite was not implemented by regulations as in the instant case. A statute which might otherwise be indefinite will not be held to be invalid if it receives administrative or judicial refinement before it is applied. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 81–82; *Miller* v. *Schoene*, 276 U. S. 272, 281; *Kay* v. *United States*, 303 U. S. 1, 9; *Noblett* v. *Carpenter*, 305 U. S. 297, 302–303; see *Smith* v. *Cahoon*, 283 U. S. 553, 565; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 242; *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233, 239; cf. *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 18; *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 196.

2. *The Registration Forms, Rules and Regulations Promulgated by the Secretary Called for Full Disclosure of All of the Registrant's Political Propaganda Activities.*

In petitioner's supplemental registration statements he declared under oath that he had read the provisions of the statute and the rules and regulations issued pursuant thereto. (R. 29, 33, 47.)

a. By Paragraph (12), Chapter IV, Part I of the Regulations (App. B, p. 15), petitioner was informed that he was "subject to the requirement of

registration" if he engaged in political propaganda activities, "whether or not" those activities were "on behalf of" his foreign principal. In other words, even if none of his political propaganda activities were performed for his foreign principal, he was still "subject to the requirement of registration," and, as the court below said (R. 334), this meant "not only the act of registering but also the duties and concomitants of registration." One of the duties incident to registration was to give, at the end of each six months, a "comprehensive statement of nature of business of registrant"—as called for by Requirement 11 of the Registration Form (R. 28, 31, 45). Obviously, this directive was definite and certain that the statement should concern *his* (the "registrant's") business, and neither expressly nor even impliedly was it limited to what was done on behalf of the foreign principal. Petitioner's contention (Br. 44) that Paragraph (12) merely identified those who must register is untenable, for the paragraph would, in that event, have been superfluous in view of Part I, Chapter III of the Regulations, which outlined Section 2 of the Act, identifying those required to register (App. B, p. 11). Moreover, if Paragraph (12) and Requirement 11 of the form considered together simply called for a statement of petitioner's activities on behalf of his foreign principal, they would also have been useless, for the reason that they would have required no more information than that disclosed in answers to the other ques-

tions on the form and in the terms of petitioner's formal contracts, copies of which were filed, as required, with the various statements.

b. It is likewise plain that the requirement of a "comprehensive statement of nature of business of registrant" called not for a broad, general statement of the registrant's "avocation" (Br. 7) but for a full, complete [13] statement of his activities. Whatever might be the meanings of "comprehensive," "nature" and "business" when divorced from their context, as relied upon by petitioner (Br. 6–8, 58, 59), we submit that when considered in the light of the statute, the registration form, and the regulations, "comprehensive statement of nature of business" meant a full disclosure of petitioner's propaganda *activities*. That activities, and not a mere generalized characterization of petitioner's pursuits, were required to be reported, was indicated, we believe, by the references to activity or activities in Sections 1, 2, 3 and 4 of the statute and in eighteen separate paragraphs of the Regulations explaining registration requirements.[14] As the court below indicated (R. 335), "The form, moreover, has some 8½ blank lines" for answering Requirement 11, which provision

[13] Petitioner's present counsel admitted at the trial (Tr. 1441–1443) that a comprehensive statement was one that was "full, complete."

[14] See Rules and Regulations, Part I, Chapter II, pars. (13)–(15), (17)–(22), and Chapter IV, pars. (12)–(18), (21) and (22), App. B, pp. 8–10.

would hardly have been necessary if a mere generalized answer such as petitioner gave was expected. Certainly it was no answer to these requirements to respond, as petitioner did, that his activities were merely those of an "author," "journalist" and "publicist." By his very act of registering, he admitted that he was engaged in *political* activities on behalf of his foreign principals, for under Section 1 (d) of the Act (App. A, p. 1) and Part I, Chapter II (18) (App. B, p. 9), of the Secretary's Regulations, a person engaged in "nonpolitical" activities, such as a *bona fide* journalist, was exempted from registration. As the court below pointed out (R. 329) the "designation of author and journalist does not even summarize the outer confines of defendant's occupational pursuits."[15]

[15] Petitioner also contends (Br. 66–67) that the "trial court over-shot the case before it" when it referred to the legislative history of the statute in its instructions to the jury. The full text of the court's charge is set forth in Appendix C, pp. 19–56. His position now seems to be that since he was being tried only for omitting material facts in his supplemental registration statements it was error for the court to discuss the Act, its history, scope and purposes generally, when only Sections 3 and 5 thereof, paragraph 11 of the forms, and the regulations relating to supplemental registration were involved. Obviously, a general understanding of the Act, what foreign agents were required to register, and what disclosures were required in the initial registration statements were essential to any kind of an understanding of the requirements which related solely to the supplemental registration statements filed every six months. Moreover, petitioner's objection at the trial to this portion of the charge was that the court in interpreting the statute could not go

3. *In view of the Element of Willfulness in the Offense, Petitioner cannot Complain of Indefiniteness of the Statute or Regulations.*

The sanctions of the statute were not applicable unless the registrant "willfully" concealed his propaganda activities; and this Court has held that where scienter must first be proved before the penalties of a statute may be applied, there is no real basis for an attack upon the statute on the ground of vagueness. *United States* v. *Ragen*, 314 U. S. 513, 524; *Gorin* v. *United States*, 312 U. S. 19, 27–28; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348.

In the present case the charge was that petitioner "willfully" omitted to disclose material facts. And contrary to petitioner's contention (Br. 61–66), now advanced for the first time, the evidence summarized in the Statement, *supra*, shows there was

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beyond "the four corners of the statute" (R. 102–106, 104)—which, of course, was not a valid objection (*United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544; *United States* v. *Raynor*, 302 U. S. 540, 543)—and, accordingly, that is the only ground which he is now in a position to urge. *Walsh* v. *Rosenberg*, 81 F. (2d) 559, 561–562 (App. D. C.), certiorari denied, 298 U. S. 663; *United States* v. *United States Fidelity and Guaranty Co.*, 236 U. S. 512, 529. Similarly, since, as we have shown, petitioner, as a registrant under the Act was required to report all his propaganda activities whether as agent or otherwise, his contention (Br. 68) that the court should have refused the Government's prayers Nos. 2, 2A, and 8 to that effect, and should have granted his prayer No. 19 to the contrary, is also without any tenable basis.

abundant proof of a willful intent to violate the statute. The record is replete with evidence of the indirection and secrecy with which petitioner shrouded his political propaganda activities, and of the substantial amount of time and money they involved. They were not casual, but highly calculated, enterprising, and covert.

Petitioner refers (Br. 66) to certain passages in the book *Spreading Germs of Hate* as a basis for his assertion that "The evidence in the record negatives any such conclusion," i. e., that his omission to disclose his activities was willful: "during the last World War * * * he assisted in Liberty Bond drives * * * and * * * received official thanks for 'effectiveness of his official advice'." It was for the jury, however, to weigh these statements along with petitioner's present conduct and the further admissions in his book that "There is no safeguard which the law can create which human ingenuity cannot circumvent" (Gov't. Ex. 12, p. 90); that "Every propagandist draped himself in the flag" (*id.*, p. 106); and that prior to our entry in the last war he was a guiding force among foreign agents who sought to mold American public opinion, where possible, through "a propaganda wolf in sheep's clothing" (*id.*, p. 105).

With this proof before it, the jury was advised not only that petitioner was required to disclose all of his political activities (Tr. 1601, App. C, p. 44), but that the jury must find that petitioner

knew he was obliged to make such a disclosure and "had the deliberate intention of avoiding the requirements of the statute" (Tr. 1594–1595, App. C, p. 39), and that they must find "whether when defendant stated 'author and journalist' in response to query No. 11 he willfully intended to conceal from the Secretary of State and the American people his activities in connection with Flanders Hall, the so-called War Debt Committees, the mailing under Congressional frank of large quantities of reprints of so-called non-interventionist material, and the writing of all or part of certain speeches for members of the Congress, and to that end willfully omitted to include these activities in his response to Query No. 11." (Tr. 1598, App. C, p. 42.) This charge was given in addition to the charge that mistake of law is no defense (Tr. 1599–1600, App. C, p. 43).

Moreover, apart from this charge, the circumstances of the offense are important in assessing a claim of indefiniteness. The statute did not lay a flat prohibition upon liberty of conduct, nor did it impose a financial obligation; it simply required disclosure of information. And the information in question, viewed most favorably to the petitioner, must have been considered by him in relation to the registration forms; it was of a character closely related to the matter which he admittedly was obliged to disclose; and it was within the purpose of the Act. The Act and Regulations were, on any view, sufficiently definite to put petitioner

on warning. Petitioner's want of caution in such a matter is not entitled to constitutional protection. When one knows that he has come close to the line "it is familiar to the criminal law to make him take the risk." *United States* v. *Wurzbach*, 280 U. S. 396, 399. As was there said by Mr. Justice Holmes:

> The other objection is to the meaning of "political purposes." This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States*, 229 U. S. 373.

Indeed, petitioner failed to seek from the Secretary of State whatever clarification seemed to be necessary; though he was at pains to do so with respect to other aspects of registration and so was aware that consideration and reply would be given to such inquiries (R. 78–86).

This is not a case, it is to be noted, where indefiniteness of a criminal statute puts to the hazard of a jury the criminality of conduct over a wide range, thus in effect leaving the law-making func-

tion to the jury after the event. Cf. *Herndon* v. *Lowry*, 301 U. S. 242, 261–264. This is a case where the petitioner himself was apprised with exceptional directness of the legislative standards and their administrative interpretation, and himself chose the hazard of criminality rather than the certain protection of full disclosure.

We submit, therefore, that petitioner, as an expert propagandist, skilled in the art of circumventing the law (Gov't Ex. 12, p. 90) cannot be heard to say that the statute failed to advise him that he was required to disclose as an acknowledged foreign agent that he was engaged in a far-flung program to influence the foreign policy of this country. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277; *Miller* v. *Strahl*, 239 U. S. 426, 432, 434; *United States* v. *Wurzbach*, 280 U. S. 396, 399; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223. And see Brief for United States in *Gorin* v. *United States*, 312 U. S. 19, Nos. 87, 88, October Term, 1940, pp. 67–74.

4. *The Secretary was Authorized to Require in the Supplemental Registration Statements Disclosure of all the Registrant's Political Propaganda Activities.*

Petitioner contends (Br. 39, 41–43) that even though the statute required disclosure of propaganda activities performed as agent for a foreign principal, nothing in the Act authorized the Secretary to require disclosure of a registrant's

political propaganda activities which were outside the scope of his agency."

As is apparent from the synopsis of the Act appearing in the opinion below (R. 330–331), and *supra*, at pp. 26–27, there can be no doubt that one plainly indicated purpose of the Act was to require every agent of a foreign principal who disseminated political propaganda in this country to register and disclose *all* of his activities on behalf of his foreign employer. But such a measure, concerned as it was with disclosure of the source which nurtured foreign propaganda, would, indeed, have been a halfway measure had it not required, or at least authorized the Secretary of State to require, the registrant to reveal the propaganda he put out on his own, as well as that he put out as an agent. "Otherwise," as was said by the court below (R. 333), "it could not be known in which of his dual capacities a registrant was acting." By setting up an ostensibly legitimate business connection every registrant could have scoffed at the law and could have engaged unrestrictedly in furthering, by the spreading of propaganda, the objectives of his foreign principal. There can be no doubt that Congress intended, when it passed the Act, to prevent

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[16] While we think, as did the court below (R. 341–343), that there was abundant proof from which the jury might have inferred that all that petitioner did was done on behalf of German principals, the jury was instructed that petitioner was required to report all of his political propaganda activities (Tr. 1601, App. C., p. 44). Hence the conviction must be sustained on that basis.

the spreading of political propaganda by foreign agents unless the American public was fully informed as to the possibility that it was subsidized from abroad." That petitioner, in particular, was

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[11] Pursuant to House Resolution 198, 73d Congress, 2d session, a special committee, of which Representative McCormack, of Massachusetts, was chairman, was appointed by the House of Representatives to conduct "an investigation of (1) the extent, character, and objects of Nazi propaganda activities in the United States [and] (2) the diffusion within the United States of subversive propaganda that is instigated from foreign countries * * *." After nine months of investigation, during which hearings were held in six different cities, the Committee rendered its final report on February 15, 1935 (H. Rep. 153, 74th Cong., 1st sess., p. 1), in which it found that "this country has been flooded with propaganda material" (*id.*, p. 8) from various alien organizations outside the United States, which were "engaged in vicious and un-American propaganda activities" (*id.*, p. 5) for the purpose of gaining "adherents" (*id.*, p. 4) and "to influence the political opinions of many of our people" (*id.*, p. 22), and also to "influence, if necessary and possible, our governmental policies" (*id.*, p. 7). It further found that "all kinds of efforts and influence, short of violence and force, were used to obtain its desired objective, which was to consolidate persons * * * into one group, subject to dictation from abroad" (*id.*, p. 9). The evils arising from Nazi employment of ostensibly legitimate business connections as a "smoke screen" for propaganda activities were called forcibly to the attention of Congress in unequivocal terms.

"As a result of" the Committee's recommendations, a bill (H. R. 1591, 75th Cong., 1st sess.), which subsequently became the act under which petitioner was indicted (Act of June 8, 1938, c. 327, 52 Stat. 631), was introduced at the next session of Congress "to require all persons who are in the United States for political propaganda purposes—propaganda aimed toward establishing in the United States a foreign system of government, or group action of a nature foreign to our institutions of government, or for any other

well aware of this fact is, likewise, evident, since his very propaganda activities for other German principals were exposed before the Committee which drafted the act and were set forth in the Committee's report urging its passage.[18] Indeed, inasmuch as petitioner was one of the principal witnesses before the Committee, he can hardly deny that he was forewarned that the legislation was designed to require him to disclose his propaganda activities. Under these circumstances, petitioner

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purpose of a political propaganda nature—*to register with the State Department and to supply information about their political propaganda activities*, their employers, and the terms of their contracts." H. Rep. 1381, 75th Cong., 1st sess., p. 2. This report was appended to and made a part of the report (S. Rep. 1783, 75th Cong., 3d sess.) submitted by the Senate Committee on Foreign Relations recommending the bill's passage in the Senate. The required registration was intended to "publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread * * * propaganda for the purpose of influencing American public opinion on a political question" (*ibid.*). Congress was advised that "Propaganda efforts of such a nature are usually conducted in secrecy, which is essential to the success of these activities," and that the "spotlight of pitiless publicity" would "serve as a deterrent to the spread of pernicious propaganda," and believed that the passage of the bill would "force propaganda agents representing foreign agencies to come out 'in the open' in their activities" or subject themselves to the penalties provided (id., pp. 2, 3). (Italics supplied.)

[18] To quote from the McCormack Committee report (H. Rep. 153, 74th Cong., 1st sess., pp. 5–6) recommending passage of legislation requiring registration of agents of foreign principals:

should have been scrupulous to comply fully with the Act, but his correspondence with the State Department (R. 78–86) indicates that he studiously avoided even making any inquiry as to his duty to

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Several American firms and American citizens as individuals sold their services for express propaganda purposes, making their contracts with and accepting compensation from foreign business firms. The firms in question were Carl Byoir & Associates and Ivy Lee-T. J. Ross. The owner of the Ivy Lee-T. J. Ross firm admitted to the committee that the reports he furnished to the I. G. Farben Industrie, his ostensible employer, dealt with public and political questions rather than trade promotion, and that they were intended to be relayed to the German Government. For this service he received $25,000, all payments of which were in cash, and an effort was made to secrete the connections. Mr. Lee also admitted that he had never made such a contract before (p. 192, N. Y. 7).

Carl Dickey, junior partner of Carl Byoir & Associates, testified that his firm handled the contract with the German Tourist Bureau with the fee for services set at $6,000 per month. He testified that the contract was secured with the help of George Sylvester Viereck who received $1,750 per month with free office space and secretary as his share of the $6,000. The committee finds that the services rendered by Carl Byoir & Associates were largely of a propaganda nature (pp. 33–67, D. C. 4).

Viereck admitted that he discussed the Byoir contract with a German Cabinet officer before it was entered into. He further testified that he had also been paid the sum of $500 monthly "for 4 or 5 months" by Dr. Kiep, former German consul-general in New York City, which was paid in cash for advice of a propaganda nature (pp. 87–111, N. Y. 7).

The first payment on the contract amounting to $4,000 was made by Dr. Kiep, German consul-general of New York City, in cash.

report the activities charged in the indictment. Moreover, in authorizing and directing the Secretary, in Section 6 of the Act (App. A., *infra*, p. 4) "to prescribe such rules, regulations, and forms as may be necessary to carry out" the Act, Congress sought to insure the administrative implementation necessary to effectuate its purposes. Certainly, to use the language of the court below (R. 333), "In view of the logical necessity of knowing all of an agent's political activities either as an agent or on his own and in view of the fact that 'carry out' must mean 'make-workable', it appears that the Act authorizes the Secretary to require the full disclosure."

Furthermore, as pointed out by the court below (R. 333–334), citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304:

> It is of interest to note that this authorization is running to the Secretary of State. The President, the Head of our Executive Branch, has the main power over foreign affairs. The Department of State is the cabinet branch through which the Executive works in problems of foreign affairs. This Act deals with agents who disseminate propaganda for foreign principals. While the registrant may be a citizen of this country, he may put himself under the Executive's power over foreign affairs when he acknowledges that he is a paid political agent of a foreign principal. Thus one can read a little more liberally the Act's authorization

> to the Secretary to do that which will make the statute work, and a full disclosure of all political activities of an agent as agent or as his own is a *sine qua non* for feasibility. * * *

Finally, it may be said that requirement 11 of the registration form, asking the registrant for a report as to *his* business, and not limited to agency activities, received the approval of Congress by its failure to change the Act of June 8, 1938, in any pertinent respect in the amendment of August 7, 1939. Cf. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500; *Brewster* v. *Gage*, 280 U. S. 327, 337; *United States* v. *Hines*, 103 F. (2d) 737, 742 (App. D. C.); *Guaranty Trust Co.* v. *Commissioner of Internal Revenue*, 79 F. (2d) 245, 246 (C. C. A. 2); *Allen* v. *Morsman*, 46 F. (2d) 891, 894 (C. C. A. 8); *The Habana*, 63 F. (2d) 812, 813 (C. C. A. 2).

## II

### THE INDICTMENT ALLEGED OFFENSES CONDEMNED BY THE STATUTE AND THE PROSECUTOR WAS NOT GUILTY OF REVERSIBLE MISCONDUCT

Petitioner also urges as grounds for reversal (1) that the indictment fails to allege an offense under the Foreign Agents' Registration Act (Br. 56–57) and (2) that the prosecutor was guilty of misconduct (Br. 49–56). Each of these contentions is without merit.

1. *The indictment was sufficient.*—In support of his contention that "the charge in the indictment was no crime under the statute" (Br. 56–57) petitioner does not address himself to the allegations of the indictment but looks to the proof which, he claims, fails to show that his alleged political activities were "hostile to the United States" or "disloyal to our country" or anything "more than an ill-advised business venture," or "that he was acting as the agent of any foreign principal." Therefore, he seems to conclude, the indictment failed to allege an offense because "None of these activities was made a crime under the 1938 Act as amended" (Br. 57). It has been fully shown in Point I, *supra,* however, that petitioner was required to disclose all of his political and propaganda activities as agent for a foreign principal or on his own behalf, irrespective of whether he or his principal were merely attempting "to show that the United States should not enter the war at all" and "to convince fellow-Americans that they should not espouse the English cause in the war" (Br. 57). It follows, therefore, that by alleging that petitioner willfully failed to disclose his propaganda plainly to the Secretary of State, the indictment clearly charged offenses condemned by the Foreign Agents' Registration Act and was in all respects sufficient.

2. *The prosecutor was not guilty of reversible misconduct.*—Petitioner assigns as error "the misconduct of the prosecuting attorney" and the failure of the trial judge to instruct the jury "to

disregard such misconduct, particularly the inflammatory closing argument of such attorney for the Government" (Br. 36). Argument in support of the assignment is found under the heading that petitioner was "Tried and convicted as a foreign propagandist" (Br. 49–56) and scattered throughout remaining portions of the brief. As nearly as we can make out, the particular acts of alleged misconduct upon which petitioner relies are: (1) that the prosecutor caused a number of mail sacks containing reprints of speeches from the Congressional Record to be brought into the courtroom (Br. 26–27); (2) that he attempted "to create sinister aspects" (Br. 27) particularly by linking petitioner with certain non-interventionist members of Congress (Br. 16–20) and by proving that the original manuscript of "Who's Who Among the War Mongers" was intercepted by the British censor at Bermuda while it was en route from petitioner to Hans Dieckhoff in Berlin (Br. 27–28); and (3) that chiefly because of his references to petitioner's book, *Spreading Germs of Hate*, the prosecutor's summation was highly inflammatory (Br. 12–16, 49–56).

It is the position of the Government that none of the foregoing acts of the prosecutor, nor all of them together, constitute reversible error. Unlike *Berger* v. *United States*, 295 U. S. 78, upon which petitioner relies (Br. 54), this is not a "weak case." As the court below pointed out, even petitioner raises no question as to the "general sufficiency of

the evidence," and on this record "none could be" raised (R. 329). In no case that we have found has the judgment of conviction been reversed because of the conduct of the prosecutor where the evidence of guilt was as overwhelming and clear as in the present case. Moreover, even if the case against petitioner were not so strong, it is our position that the acts complained of would not entitle the petitioner to a new trial.

a. *The mail bag incident.*—The court of appeals characterized as "unnecessary stage business on the part of the prosecutor" (R. 350) his action in causing to be brought into the courtroom a number of mail sacks which purported to contain reprints of speeches which had been printed in the Congressional Record. We think it is clear from the entire record, however, that such impropriety as may be found in the prosecutor's action was engendered by his enthusiasm at the trial and not by any deliberate intention to be unfair; certainly it cannot be said that the incident tipped the balance against the petitioner.

Petitioner's counsel had expressed a desire to examine certain speeches of various Congressmen and Senators which George Hill had mailed out. The prosecuting attorney stated that he did not believe all the speeches were then in court but that there were some eighteen or twenty mail sacks full in the Marshal's office which could be brought into court for petitioner's counsel to examine. Petitioner's counsel made no objection to this proposal

(Tr. 663–664). During the afternoon session of the same day, Prescott Dennett was called by the court as a witness (Tr. 700), but declined to answer the court's questions, standing on his constitutional privilege against self-incrimination (Tr. 701–705). After the witness was excused, the prosecutor requested that he be recalled, and stated to the court in a side bar discussion that he wished to ask him to identify the sacks of speeches which were removed from his home, and which were the speeches petitioner's counsel had asked to see (Tr. 705–706). Petitioner's counsel objected to having the sacks brought in, stating that the speeches could be produced without producing the mail sacks. The court declined to recall the witness, but said nothing as to whether the prosecutor could bring in the mail sacks. Shortly thereafter, while the witness Hill, who had been recalled to testify, was on the stand, the mail sacks in question were brought into the courtroom, whereupon petitioner's counsel objected, stating that the court had just forbidden the prosecutor to bring in the sacks. The prosecutor denied that he had been forbidden to do so and referred petitioner's counsel to the record. The court, however, ordered the sacks to be removed, stating that there was no occasion for them. (Tr. 707–708.)

Viewed as a whole, we submit that the court of appeals correctly ruled that "the ends of justice would not be served * * * by reversing on instances of improper action like this" (R. 350), par-

ticularly since the jury had heard about these mail sacks from at least two witnesses (see Tr. 552–553, 582). Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 237–243; *Shushan* v. *United States*, 117 F. (2d) 110, 116 (C. C. A. 5), certiorari denied, 313 U. S. 574.

b. *Attempts of prosecutor "to create sinister aspects."*—Petitioner also asserts that the prosecutor attempted to "smear" certain non-interventionist members of Congress and then linked petitioner with them (Br. 16–20) and further sought "to create the appearance of sinisterism" by proving that petitioner forwarded the original manuscript of "Who's Who Among the War Mongers" to Hans Dieckhoff in Berlin (Br. 27–28). It is clear, however, that petitioner's contention amounts to no more than a belated protest against the admission of damaging evidence and has nothing to do with the conduct of the prosecutor. That the evidence was properly received seems obvious. Petitioner's failure to disclose his association with members of Congress for political purposes was part of the gravamen of each count of the indictment. Similarly, the evidence which showed that petitioner surreptitiously sent a sample of his work to a high German official was not only relevant but almost conclusive proof that petitioner was acting as a propagandist for a foreign principal.

c. *The prosecutor's arguments to the jury.*—Petitioner's claim that the prosecutor's arguments

to the jury were inflammatory is mainly based upon his references to petitioner's own book, *Spreading Germs of Hate,* which was admitted in evidence [19] (Br. 12–16, 49–56). Having been properly admitted, however, the book was competent evidence, and a proper subject of reference and comment by the prosecutor. There is no rule preventing references by counsel to portions of a lengthy documentary exhibit or requiring that an entire document be read as prefatory to or in connection with a comment on or a quotation from it. Moreover, petitioner did not initially object to the selective manner in which the prosecutor quoted from the book (R. 123–131), but reserved the right to use it in the same manner (R. 123), and the objection was apparently an afterthought (R. 130–131). As the court below noted, the book was "used liberally by both sides" (R. 346), petitioner taking full advantage of his reservation and directing the jury's attention to some favorable portions of it (Tr. 895–897) which, the record shows, can be said to have constituted his chief defense.

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[19] Petitioner also assigns error on the admission of the book (Br. 35) but does not strongly press the point (Br. pp. 51–52, n. 11). As the court below held (R. 345–346), the book was admissible to show that petitioner's failure to disclose his propaganda activities was willful and intentional, and was not the result of chance, inadvertence, or ignorance. See 1 Wigmore, *Evidence* (2d ed.; 1923), secs. 301–302, 304; *Partridge* v. *United States*, 39 App. D. C. 571; cf. *Haywood* v. *United States*, 268 Fed. 795, 807 (C. C. A. 7), certiorari denied, 256 U. S. 689; *Langer* v. *United States*, 76 F. (2d) 817, 827 (C. C. A. 8).

The choice of language in summation must rest with the attorney, and it cannot be reversible error that he fails to coin his own but selects descriptive phraseology from the literary product of the defendant or some other source.

Petitioner also complains of other statements by the prosecutor (Br. 50). The trial judge (Tr. 1590–1591) and the court below (R. 350) pointed out that petitioner's first objections, coming in the middle of the charge to the jury, were made too late to permit the correction of any wrong inference by timely explanation. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239; *Petrilli* v. *United States*, 129 F. (2d) 101 (C. C. A. 8), certiorari denied, October 12, 1942. Moreover, as the court below also suggested (R. 349), many of the prosecutor's remarks may have been provoked, in some measure, by defense counsel's attempt to turn the case into a trial of the Government and his comparison of the prosecution with a Communist, Fascist or Nazi persecution (Tr. 1528), and by his elaborate speculation that the indictment was brought to besmirch "five unnamed defendants," public officials, each of whom he discussed at length (Tr. 1511–1516). The statements now complained of were made in the Government's rebuttal. In its principal summation, the Government said (Tr. 1499–1500):

> Did this defendant engage in the activity with which he is charged? Is that activity

material information which the American public is entitled to know about, and did he disclose it? That is the only issue in this case. We are not trying ex-Senator Ernest Lundeen; we are not trying Congressman Hamilton Fish; we are not trying the issue of Isolationism versus Interventionism. That is being decided in another forum. We are not trying anyone but this defendant, George Sylvester Viereck, and we are not trying this defendant, George Sylvester Viereck, for anything but a willful failure to disclose propaganda activities required by law to be made known to the American public. That is the issue in this case.

Also, it is submitted that, if the complained of statements and characterizations are read in their original context, the particular language employed was justified by the evidence and "material to the philosophy" of the crime charged. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239. A prosecutor may strike "hard blows" so long as he does not strike "foul" ones. *Berger* v. *United States*, 295 U. S. 78, 88. As Judge Learned Hand said in *Di Carlo* v. *United States*, 6 F. (2d) 364, 368 (C. C. A. 2):

> * * * While, of course, we recognize that the prosecution is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge or jury, or to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is

entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice; it is to deny what has always been an accepted incident of jury trials, except in those jurisdictions where any serious execution of the criminal law has yielded to a ghostly phantom of the innocent man falsely convicted.

Finally, the charge to the jury incorporated requests on behalf of petitioner which admonished the jury that our relations with Germany were not to be weighed in considering petitioner's guilt or innocence, and that his registration did not warrant an assumption that he was engaged in an unpatriotic activity. The court charged (Tr. 1604, App. C. pp. 46–47):

The defendant here was registered as the agent of certain principals domiciled in Germany. During the periods covered by this indictment the relations between this country and Germany were tense. Although we were then not in a state of war with Germany, the relationship was shrouded with an atmosphere of hostility and unfriendliness. These circumstances are to play no part in your consideration of the guilt or innocence of this defendant.

The mere fact of registration under the Act affords no ground for assuming that any

> person registered as an agent for a foreign principal, including this defendant, was engaged in an unpatriotic activity.

We therefore respectfully submit that it was the clear and convincing proof that petitioner had failed to disclose his propaganda activities and not the conduct of the prosecutor which impelled the jury to convict him and that he was given a fair and impartial trial. Cf. *United States* v. *Dubrin*, 93 F. (2d) 499, 506 (C. C. A. 2), certiorari denied, 303 U. S. 646, where the court said:

> The attempt to turn this trial of men whose guilt was abundantly proved into a trial of government's counsel, though a not infrequent expedient of defendants who have no other recourse, ought not, in our opinion, to succeed.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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